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Klabbers, Jan

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Principled Pragmatist? Bert Röling and the Emergence of International Criminal Law

Jan Klabbers[1]

I Introduction

There is considerable irony in the widely held view that Bert Röling should be seen as one of the founders of international criminal law – in fact, a dual irony. First, Röling wrote relatively little on international criminal law. His academic interests were elsewhere: with the Dutch criminal law and criminology to which he devoted his early career; with the establishment of a discipline of war studies (*polemology*) for which he became well-known in the Netherlands and abroad, and with his early recognition of the influence of colonialism on the history and substance of international law.[2] In that respect, Röling is like some other figures in this book, a more or less accidental figure in the Pantheon of early international criminal lawyers.[3]

Second, the little he did write on international criminal law was not all that much devoted to international criminal law in any strict sense. In writing a lot about aggression, Röling occupied himself mostly tangentially with international criminal law, as his role as dissenter at the Tokyo Tribunal also suggests. He is best-known for his dissenting opinion rendered as judge in the Tokyo Tribunal, and this opinion is mostly devoted to crimes against peace.[4] The category of crimes against peace is not a central category of today's international criminal

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[1] Jan Klabbers is Professor of International Law at the University of Helsinki. I am much indebted to Nico Schrijver (formerly Röling's assistant) for his willingness to share memories and impressions, though I cannot guarantee that he would subscribe to everything that follows.

[2] See B.V.A. Röling, *International Law in an Expanded World* (Amsterdam: Djambatan, 1960), which remains a classic in the field of international legal studies as one of the first studies acknowledging the influence of colonialism on international law.

[3] I take international criminal law, for present purposes, to refer to the body of law addressing conduct relating to armed conflict, rather than the law relating to extradition or mutual assistance in the prosecution of common criminals, which is nowadays more usually referred to as transnational criminal law. See in particular Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012).

[4] The dissent is reproduced in B.V.A. Röling and C.F. Rüter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East, volume II* (Amsterdam: Amsterdam University Press, 1977), 1043-1148.

law and, it has been argued, is unlikely to become one: despite all the fuzz surrounding the adoption of a putative definition of aggression and the inclusion of such a category in the Statute of the International Criminal Court, there are simply too many parties that will be implicated both on the side of the aggressor and the victim to apply the notion with great seriousness.[5] What is more, definitions of aggression, including the 2010 Kampala amendment to the ICC's Rome Statute, are inevitably open-ended: article 8*bis* ICC lists a number of activities that may qualify as aggression, but also specifies that determinations need to take all circumstances into account, including the gravity and the consequences of the maligned act – and that carries a great potential for emptying the prohibition of much of its contents.[6]

Nonetheless, as we will see, the concept of the 'crime against peace' was central to Röling's thought – he suffered a serious ethical dilemma revolving around this very notion.[7] What is more, Röling's dissenting opinion oozes a humanist (for want of a better term[8]) spirit that is interesting in order to understand some of the early dilemmas of international criminal justice: he was keen to understand the motives and context of Japanese aggression during World War II, and not afraid to let this context influence his decision-making. The law (such as it was) is constantly applied, by Röling, with a keen view to understanding why people behaved as they did, and herewith imbued by a sense of empathy with the perpetrator not usually immediately associated with international criminal tribunals, and even less with those that can be classified as representing some degree of 'victor's justice'.[9]

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[5] The point is made, with markedly greater subtlety, by Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law*, 1-35.

[6] The definition was adopted by consensus at the 2010 Review Conference held in Kampala, Uganda, and recorded as RC/Res.6, 11 June 2010.

[7] His wrestling with the concept of crimes against peace in Tokyo is not always fully appreciated by later commentators aiming to understand the black letter of international criminal law: see, e.g., Harmen van der Wilt, 'A Valiant Champion of Equity and Humaneness: The Legacy of Bert Röling for International Criminal Law' (2010) 8 *Journal of International Criminal Justice*, 1127-1140. It is nicely captured though in Kees van Beijnum's excellent novel *De offers* (Amsterdam: Bezige Bij, 2016), which tells the story of a fictitious Dutch judge taking part in the Tokyo trial.

[8] Kelk refers to Röling as a 'rational humanist', and the term seems apt enough. See Constantijn Kelk, 'Bert Röling as a Criminal Law Scholar' (2010) 8 *Journal of International Criminal Justice*, 1093-1108, at 1101.

[9] For a thoughtful discussion of victor's justice and show trials (and the distinction between them), see Neil Boister, 'The Tokyo Military Tribunal: A Show Trial?', in Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds.), *Historical Origins of International Criminal Law: Volume 2* (Brussels:

And yet, it is precisely for this reason that Röling thoroughly deserves his place in the pantheon of international criminal law. His Tokyo dissent is a constant reminder to the discipline that international criminal law is not just about rules, further rules, and yet further elements of rules – although it is that too. It is also a reminder that things may never be what they seem to be at first sight, that people taking part in nasty regimes may actually try to prevent those regimes from being nastier. His dissent suggests that the ethics of international criminal law should be handled with care: good and evil may be far more difficult to distinguish than is commonly assumed.[10]

Indeed, in an important sense, Röling embodies the very ambivalence of international criminal law. International criminal law is international in name, but departs from most international law by focusing on the individual rather than the state. It is also criminal in name, but departs from most criminal law by focusing not on common crimes, but on the exceptional, politically inspired crime. It does its work operating in various grey areas: between international law and criminal law; between political crime and common crime; between institutionalized evil and individual nastiness. It oscillates between the monstrosity of evil and, in Arendt's often misunderstood phrase, the banality of evil.[11]

In much the same way as international criminal law is neither purely criminal law nor purely international law, so too many of Röling's positions are characterized by ambivalence. He was, by any standard, a peace activist, but one who opposed unilateral disarmament and upheld the mutual *détente* emanating from nuclear weapons.[12] He has been characterized as a proponent of a socially

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TOAEP, 2014), 3-29. See generally also Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007).

[10] It is surely no coincidence that his views are represented with considerable sympathy by as deep a political thinker as Shklar: see Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge MA: Harvard University Press, 1986 [1964]).

[11] See Jan Klabbers, 'Just Revenge: The Deterrence Argument in International Criminal Law' (2001) 12 *Finnish Yearbook of International Law*, 249-267. The reference is, of course, to Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994 [1963]).

[12] Admittedly though, the older Röling became more critical of the wisdom of nuclear détente, fearing that the possession of nuclear weapons would inevitably lead to their use. The point is noted by his successor in Groningen: see Wil D. Verwey, 'Bert V.A. Röling (1906-1985)', in T.M.C. Asser Institute (ed.), *The Moulding of International Law: Ten Dutch Proponents* (The Hague: T.M.C. Asser Institute, 1995), 27-68. Röling himself would later say that sometimes peaceful relations

responsive and responsible law who, nonetheless, also remained a 'somewhat technical legal craftsman'.[13] He was committed to detention and punitive theories about deterrence, but also advocated fair and humane treatment of suspects. Much as he advocated humane treatment, he was not against the death penalty, and agreed that for some of the Japanese war criminals at Tokyo this was the most appropriate sentence. It is remarkable how even his physical appearance is often described in ambivalent terms: he was tall and dignified and nursed strong opinions, but was said to have a soft voice.[14]

II Young Röling

Bert Röling grew up in the southern, Catholic part of the Netherlands. In a sense, this version of Catholicism itself embodies a curious compromise: it is a Catholicism that is strongly influenced by the type of Calvinism that used to prevail in most of Holland – and still does in a few 'bluestocking' pockets. Hence, Dutch Catholicism is an austere version of Catholicism, without the *joie de vivre* that characterizes the Catholicism of southern Europe and Latin America, or even neighbouring Belgium. The Dutch brand of Catholicism is a version of Catholicism where rituals have become dissociated from their original meaning; where the cathedrals are considerably less lavish than their counterparts in Italy or Spain, and where the churchgoing folk are more serious and inward-looking than elsewhere in the Catholic world.

Röling grew up in 's Hertogenbosch, a mid-sized city in the south with Holland's best-known cathedral, the St. Jan, and the seat of possibly the leading Dutch diocese. His social class was, it seems, *petit bourgeois*: his father was a businessman (running a small garment factory) who fell on hard times and tried

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must be sacrificed when other values are at stake. See B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity, 1993), at 97.

[13] See Nico Schrijver, 'B.V.A. Röling – A Pioneer in the Pursuit of Justice and Peace in an Expanded World' (2010) 8 *Journal of International Criminal Justice*, 1071-1091, at 1077. Schrijver characterizes Röling as 'reluctant dissident' (*ibid*., at 1091); one can understand why, but it may not be entirely compelling, as I will suggest below.

[14] See Antonio Cassese, 'B.V.A. Röling – A Personal Recollection and Appraisal' (2010) 8 *Journal of International Criminal Justice*, 1141-1152. Schrijver, in an unpublished presentation, puts it even sharper: Röling spoke with a soft voice but in such a manner that everyone would listen to him. See Nico Schrijver, 'Röling-Symposium: Inleiding' (undated and unpublished, on file with the author).

to hide it by continuing to drive a fine car in a bid to "keep up with the Joneses" as it were. Eventually, he failed, and crashed his car into a tree, not entirely by accident.

Röling went on to study law at what was, at the time, the Catholic University of Nijmegen. This was the place where in 'pillarized' Holland[15] the Catholic intelligentsia would send their offspring, and where Catholic politicians were trained and nurtured until well in the 1970s and 1980s.[16] Already at law school, he proved to be something of a dissenter: he was suspected of anti-Catholic agitation, and as a result came close to being expelled.[17]

Nonetheless, he managed to graduate, and moved along with his mentor Willem Pompe to the University of Utrecht, where he wrote a PhD thesis on the intersection of criminal law and criminology. Pompe had just set up a Criminological Institute at Utrecht University, and Röling worked as his assistant.[18]

Upon completion of his doctoral work, he was appointed on the bench, as a starting young judge. This too ended up involving some dissent: during the Nazi occupation of Holland, he cunningly circumvented a piece of new legislation, much to the Germans' chagrin.[19] He left his position in central Utrecht for one in peripheral Zeeland, on Holland's South Western coast and far away from the centers of commerce and industry. Here he sat out the remainder of the war in

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[15] The classic study is Arend Lijphart, *Verzuiling, pacificatie en kentering in de Nederlandse politiek* (Haarlem: Becht, 1968).

[16] Dutch Prime Minister Andries van Agt, e.g., prominent in the 1970s and 1980s, represented the Catholic political party (which merged at some point into a Christian-democrat party) and had taught criminal law at Nijmegen.

[17] His son suggests (while acknowledging that he cannot be certain) that as a teenager Röling may have been abused, or at least approached, by Catholic priests. See Hugo Röling, *De rechter die geen ontzag had* (Amsterdam: Wereldbibliotheek, 2014), at 15-16.

[18] The Pompe Institute housed what became known as the 'Utrecht School' of criminology, and still exists, although it now encompasses not just criminology but criminal law in general.

[19] The Germans had abolished the idea that individuals could be convicted conditionally. Confronted with a case of someone accused of having insulted a member of the Dutch NSB (the Nazi-like party of Holland), Röling decided not immediately to sentence the accused (apparently a decent person with unblemished record), but to postpone sentencing by three months. This technically did not qualify as a 'conditional conviction', but amounted to much the same in practice. The episode is recorded (including a newspaper clipping from 1941) in H. Röling, *De rechter*, at 28.

relative tranquility, and wrote a book on Shakespeare and criminal law – showing himself to be quite the visionary.[20]

In between, he spent some time studying in Germany, in Marburg in particular. Relatively little is known about his German days and the influence this may have had on his thinking. This is especially intriguing as Marburg, in the late 1920s and early 1930s, was the 'place to be' for those with a philosophical interest. Heidegger had been teaching in Marburg, and was widely rumoured to be re-inventing western philosophy from the ground up, to make thinking 'come to life' again.[21] Notable philosophers and political theorists took their first steps in those days in Marburg, including Hannah Arendt, Hans Jonas, Hans-Georg Gadamer and Leo Strauss. There is not much evidence of any clear and direct influence of this type of thinking to be found in Röling's work and it is possible that he never even realized the lofty company he was keeping, and that as a law student he would not have come into contact with the exalted work going on in Marburg's philosophy department at any rate. On the other hand, however, Röling never was a black letter lawyer; much of his work testifies to a broader interest, so nor can it be categorically excluded that he was aware of the intellectual developments taking place around him – and possibly influenced by them.

Having moved back to Utrecht after the war, he came to be appointed on a so-called extraordinary chair (in the Dutch system, these are part-time chairs sponsored by some external benefactor) at Utrecht University, a chair on Indonesian[22] criminal law and procedure. This was set up, it seems, to provide a counterweight to the traditional chair on Indonesian law that existed in Leiden.[23] What Röling was probably not very aware of was that his new chair in Utrecht

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[20] Shakespeare briefly became a popular object of study with the emergence of international criminal tribunals half a century later: see, e.g., Theodor Meron, 'Shakespeare's Henry the Fifth and the Law of War' (1992) 86 *American Journal of International Law*, 1-46.

[21] See Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World*, 2nd edn (New Haven CT: Yale University Press, 2004), at 49 (citing Arendt).

[22] Indonesia as a name only came in vogue after the country achieved its independence; it used to be referred to as Dutch Indies. I will nonetheless consistently speak of Indonesia, if only because the term Dutch Indies is difficult to turn into an adjective.

[23] The Leiden chair will forever be associated with Cornelis van Vollenhoven, who occupied it during the early parts of the twentieth century and was also an international lawyer of repute, best known for his *De drie treden van het volkenrecht* (The Hague: Martinus Nijhoff, 1918). On Van Vollenhoven, see the biography by Henriette de Beaufort, *Cornelis van Vollenhoven 1874-1933* (Haarlem: Tjeenk Willink, 1954).

was meant to serve the interests of the oil industry – Indonesia was, and remains, a big oil-producing nation and the faculty concerned has been called the 'Oil Faculty'; the Leiden chair, by contrast, was deemed too progressive.[24] It was against this background, and before he could actually start his academic work[25], that he was selected to become one of the judges in the Tokyo Tribunal.
What captures the imagination when thinking about the relatively youthful pre-Tokyo Röling is that already as a young man he displayed a marked tendency towards brinkmanship. He dissented both as a student in Nijmegen and as young judge in Utrecht; in both cases, he dissented strongly and cleverly; and yet in both cases, he stopped just short of personal disaster.[26] He did not go as far as to get himself expelled from the Catholic University; he did not go as far as to be incarcerated or worse under the German occupation, and he even (something he later deeply regretted) signed a declaration that he was of Aryan blood.[27] He typically managed to craft careful compromises between the demands of his own conscience and the demands of the powers around him – he would do the same in Tokyo, and thereafter as well.[28]

III Tokyo Calling

Röling was not, it seems, the first choice, or even the second choice to join the Tokyo tribunal as the Dutch judge. The Netherlands, being the parent country of one of the countries invaded by Japan, was entitled to send both a judge and a prosecutor, and both positions proved difficult to fill. The Dutch government had a well-defined interest in participating in full: it felt that the 'Japanization' of Indonesia had to be part of the indictment, something less obviously a priority for the other participating states. But while it had a serious interest, it found it

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[24] See H. Röling, *De rechter*, at 174.
[25] See C.G. Roelofsen, 'Röling, Bernardus Victor Aloysius (1906-1985)', in *Biografisch Woordenboek van Nederland*, available at http://resources.huygens.knaw.nl (last visited 7 January 2015).
[26] His son drily remarks that Röling was no hero, and well aware of it. See H. Röling, *De rechter*, at 29.
[27] *Ibid*., at 75.
[28] Cassese suggests that the 'most notable facet' of Röling was his nuisance value: Röling would never bow to the orders of superiors but also refrain from performing his disobedience center stage. See Röling and Cassese, *The Tokyo Trial*, at 9.

difficult to find properly qualified people. Some candidates were excellent lawyers but uncomfortable working in English; some were politically not considered acceptable as representatives of the Kingdom; some were unavailable or reluctant to leave their families behind.

Eventually the choice fell on the relatively young and inexperienced Röling for the judicial position, and W.G.F. Borgerhoff Mulder as the Dutch prosecutor.[29] An assistant prosecutor was appointed precisely to handle the Japanization charge: this was J.S. Sinninghe Damsté, who had been working in Indonesia as a lawyer for many years.[30] And whatever the Dutch interest may have been, the government was not rewarding its representatives royally: especially at first, the financial compensation was decidedly meager, such that Röling's wife complained.[31] On the other hand, the judges were placed in the most luxurious hotel in Tokyo, the Imperial Hotel designed by Frank Lloyd Wright, and Röling ended up living in a suite in the hotel during his time in Japan. Luxurious as the hotel was, it was far from sound-proofed: Röling complained about noise produced by his lusty and apparently somewhat sadistically inclined next door neighbor.[32]

These appointments of Röling as judge and Borgerhoff Mulder as prosecutor would prove problematic, in that Borgerhoff Mulder was far more 'senior' than Röling – who was the youngest judge on the Tribunal by a considerable margin – and felt that he himself would have made a far superior judge.[33] Hence, in relations between the two, a certain 'jalousie de métier' was never far away, and Borgerhoff Mulder did little, it seems, to support Röling.[34]

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[29] On the selection, see L. Van Poelgeest, *Nederland en het Tribunaal van Tokio* (Arnhem: Gouda Quint, 1989), 27-35.

[30] In the part of his memoires addressing the Tokyo Tribunal, he concentrates first and foremost on the Japanization charge. See J.S. Sinninghe Damsté, *Advocaat – Soldaat* (Amsterdam: Van Soeren & Co., 1999).

[31] See H. Röling, *De rechter*, at 98.

[32] *Ibid*., at 59-61.

[33] Röling himself told people that he and Borgerhoff Mulder got along just fine, but nonetheless depicted him as lazy and pompous, in no uncertain terms. See *ibid*., at 207.

[34] It cannot be ruled out (but has never been investigated as far as I am aware), that class jealousy may have also been a factor. Many of the members of the Dutch legal establishment, like Borgerhoff Mulder and Sinninghe Damsté, had double-barreled last names, indicating if not nobility then at least considerable privilege. Röling, by contrast, hailed from more common origins, his father having been a small-time businessman. It cannot be excluded that the legal establishment viewed Röling as a clever upstart. Röling himself, on the other hand, is said to have had a lifelong fascination with nobility, and was 'a bit of a snob'. See *ibid*., at 288.

The Tokyo Tribunal consisted of nine judges and nine prosecutors drawn from the states that signed the Instrument of Surrender concerning Japan (i.e. Australia, Canada, China, France, the Netherlands, New Zealand, the USSR, the United Kingdom and the United States of America), plus two additional ones. The United Kingdom insisted that India be separately represented, upon which the US countered by proposing a separate seat for the Philippines – neither of these were independent at the moment the Tribunal was created. The chief prosecutor was an American (Joseph Keenan), as this was America's project, Japan having surrendered in effect to General Douglas MacArthur. The chief justice was Australia's Sir William Webb, but his influence was never great and was considered to be waning towards the end of the proceedings. In the end, 28 high-ranking Japanese military and political officials were prosecuted for crimes against peace, war crimes and crimes against humanity, on the basis of a Charter promulgated by MacArthur, if modelled on the London Charter that gave rise to the Nuremberg Tribunal.

IV Crimes against Peace

Röling proved critical of the Tokyo tribunal on several points, and it has been suggested that here he discovered the disregard of international law for viewpoints other than that of the West.[35] His most fundamental criticism of the Tribunal related to its very jurisdiction. In essence, his problem was this. According to him, the Tribunal should only be operating if the Tribunal itself was in harmony with, or at least not in contravention of, international law. To some extent, this was never problematic: it was clear, to Röling as well as to his fellow judges, that prosecuting individuals for war crimes would itself be in harmony with international law. Where he did have an issue though was in the prosecution of individuals for committing crimes against peace. This, he felt, was a new category, which as a crime leading to individual responsibility did not yet have a basis in international law.[36] Hence, to the extent that the Tokyo Tribunal

[35] See Verwey, *Bert V.A. Röling*, at 34-5.
[36] While war had been, at least in some ways, outlawed in the 1928 Briand-Kellogg Pact, this treaty did not envisage anything even approximating individual responsibility – if anything, it was still firmly based on statist assumptions.

was engaged with prosecuting individuals for crimes against peace, it would be in tension with international law as it existed prior to World War II.

What complicates matters was that Röling's position came with a degree of sophistry and, no less awkward, that he would eventually change his mind – not by much, but just enough to appease himself, and to estrange him from most of his fellow judges.[37] The sophist elements were, as they became apparent in his correspondence with Dutch international law professor J.H.W. Verzijl,[38] as follows. Röling never contested that victorious powers would have the power to make new law after a conflict. Likewise, he never doubted that they would have the power – and the right – to act against their erstwhile enemies. Moreover, in every legal order it was possible to take protective measures against those who were not of sound mind, or otherwise a menace to society. Hence, it would not be much of a problem, legally speaking, if victorious powers were to send enemy leaders into exile (he was fond of recalling Napoleon's fate as a precedent) or to lock them up and throw away the key. But, so he suggested, this owed nothing to considerations of crime and punishment – this had nothing to do with criminal law. Instead, this type of action was engaged in not so as to punish a criminal, but so as to render an enemy harmless.[39]

By contrast, in making new law, the lawmaker does not have unlimited powers: new law must be made (so we may surmise) following the existing rules on law-making and, preferably, not run counter to existing law. Either way, the lawmaker does not have 'plein pouvoirs'.[40] In the end, Röling himself put it well in a concept judgment presented to his fellow judges: 'Using war crime trials for the purpose of eliminating undesirable elements would mean the mixing up of justice and expediency, and would frustrate both.'[41]

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[37] The degree of ostracization is perhaps best symbolized by the awkward circumstance that the lead prosecutor, Joseph Keenan, co-authored a monograph on the Tribunal just after it had finished its work, and never once mentioned Röling – or Pal, for that matter. See Joseph B. Keenan and Brendan F. Brown, *Crimes against International Law* (Washington DC: Public Affairs Press, 1950).

[38] As reported in Van Poelgeest, *Nederland en het Tribunaal*, at 73-74.

[39] One cannot help but wonder what Röling would have made of the incarceration without trial of terrorism suspects in Guantanamo; his analysis seems rather Schmittian. On the notion of the enemy in international legal thought, see Walter Rech, *Enemies of Mankind: Vattel's Theory of Collective Security* (The Hague: Martinus Nijhoff, 2013).

[40] See van Poelgeest, *Nederland en het Tribunaal*, at 74.

[41] Quoted in *ibid*., at 77.

It was this insistence on the need to demonstrate the prior legality of the crime against peace that landed him in hot waters with his fellow judges in Tokyo as well as with the Dutch government. These univocally suggested that the jurisdiction of the Tribunal stemmed from its Charter, and that by accepting the assignment (i.e., a seat on the bench) Röling had accepted as much. Whether the Charter itself was in conformity with international law was neither here nor there; this was not a matter for the Tribunal to express itself on.

This official position was, quite obviously, a pragmatic position, but not without problems even on its own grounds. After all, the Tokyo Charter rested not on the consent of all states concerned, not even only those on the winning side, but was in essence contained in a decree issued by General MacArthur, following Japan's surrender.[42] It would have been fine, so Röling may be understood, to view this as the exercise of powers by a victorious power, but it was far more problematic to regard this as the starting point of new law – and if it was indeed new law, it by definition violated the *nullum crimen sine lege* principle.

Complicating the picture further was the awkward circumstance that on one reading of the facts, the Dutch were never the victim of Japanese crimes against peace. Quite the opposite: the Dutch declared war on Japan after the latter had attacked Pearl Harbor, at a time when the war had not yet reached Indonesia. Hence, from this perspective, Japan could not be viewed as having initiated aggression against the Netherlands. This made Röling's position all the more difficult, for how can one apply the notion of crime against peace when no such action has taken place against your own state even as it is supposed to be the very justifying factor for your own presence on the Tribunal?

There are counter-arguments, of course. Perhaps Japanese imperialism in Asia generally could be seen as paving the way for aggressive war, rendering any particular attack less relevant for legal purposes. Or perhaps it could be argued that the decisive moment took place a week before Pearl Harbor, when the Japanese government decided to start war against the US, the United Kingdom and the Netherlands, but felt it strategically wiser not to issue formal

[42] MacArthur's promulgation, in turn, gave effect to paragraph 10 of the Postdam declaration of 26 July 1945 (initially declared by the USA, the UK and China, later also adhered to by the USSR), which offered Japan the chance to surrender and promised that 'stern justice shall be meted out to all war criminals'.

declarations of war.[43] Be that as it may, it would have been easier for Röling, no doubt, had there been an initial act of aggression by Japan against the Netherlands. [44]

Still, Röling managed to reach a position that eased his conscience without completely giving up on it. At some point, he decided that the creation of a new category of crime against peace was actually inherent in being victorious after a just war. In a letter to the Dutch government written in the summer of 1948, not too long before the judgment was arrived at, he reached the conclusion that since the victorious powers are responsible for keeping the peace after conflict, they actually can lawfully use criminal trials as political instruments. Where his earlier position had juxtaposed politics versus law, he now brought politics and law together: dealing with the enemy by judicial means was among the tools in the toolkit of the powerful, even if done more in order to render harmless any opponent than in order to achieve judicial retribution.

It followed, however (and this was crucial for Röling) that enemies thus identified should never be executed. It would be perfectly okay to incarcerate them, even after what would essentially be a show trial. But this would have to occur on the basis of a paradigm shift: the individual was seen as an enemy, no longer (or not at all) as suspect of a crime. And thinking in terms of the enemy-as-enemy would not justify the imposition and execution of the death penalty – this was bolstered under reference to the Nuremberg trial, where none of the suspects had been sentenced to death for crimes against peace only.[45] In his letter to the government, Röling referred to the importance of just war (*bellum justum*), and it seems accurate to regard this as an important condition – surely any aggressive victors would be less justified in rendering enemies harmless. Inventive as Röling's position appears, he reached it only after considerable soul-searching. One of the intriguing elements of his position is that he was constantly

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[43] See van Poelgeest, *Nederland en het tribunaal*, at 44.

[44] The Tribunal eventually treated the Dutch behaviour as self-defense against an imminent attack, although in the literature it is sometimes suggested that the Netherlands resorted to collective self-defense, as discussed in Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal – A Reappraisal* (Oxford University Press, 2008), at 123.

[45] Quoted in *ibid*., at 88. Cryer suggests that Röling may have missed a beat here: while it is true that no one at Nuremberg was sentenced to death for crimes against peace alone, it is not clear that the judges at Nuremberg were sentencing on this basis: See Robert Cryer, 'Röling in Tokyo: A Dignified Dissenter' (2010) 8 *Journal of International Criminal Justice*, 1109-1126, at 1116.

aware of representing his country, and not just any country but, as he repeatedly confirmed, the country of Grotius. He described himself in this way in his correspondence with Verzijl, referred to above, as well as his correspondence with Leiden's professor Van Eysinga[46] in 1946. This suggests that the link between war crimes trials and the concept of just war may have been germinating for a considerable period of time.

Röling would maintain his position consistently and to the end. His dissenting opinion finishes with how he would sentence the various suspects, and it comes as no surprise that he would sentence none of those suspected and found guilty of crimes against peace to the death penalty: 'From the law as it now stands, it follows that no one should be sentenced to death for having committed a crime against peace.'[47] Instead, he would either advocate acquittal or incarceration. Indeed, even much later in the mid-1950s, when discussions ensued about pardoning those who had been incarcerated, he felt that those found guilty of crimes against peace alone should be pardoned: they were no longer in a position to do any damage.[48] Since Röling viewed incarceration for crimes against peace not as punishment but as the temporary neutralization of a threat, it followed that there was no obstacle, to his mind, to granting pardons once the threat had disappeared.[49]

V Individual Responsibility

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[46] There is some confusion on the identity of this person. Van Poelgeest refers in the text of his book (*Nederland en het Tribunaal*, at 74) to W.J.M.V. van Eysinga, but gives him a different fourth initial (W.J.M.W.) in the index. Hugo Röling's biography of his father (*De rechter*) echoes Van Poelgeest's index, referring to W.J.M.W. van Eysinga. Most likely however is that the person concerned was W.J.M. van Eysinga, a former Dutch judge in the Permanent Court of International Justice. At the relevant time, Van Eysinga was emeritus professor at Leiden, and without doubt a highly influential member of the Dutch foreign policy establishment – he enjoyed the confidence of Queen Juliana, who had been his student, as had several Ministers of Foreign Affairs. The repertory of law professors at Leiden only mentions this Van Eysinga: available at http://hoogleraren.leidenuniv.nl/search?f1-faculteit=Rechtsgeleerdheid;docsPerPage=1;startDoc=119.

[47] See Röling's dissent, at 1116.

[48] The Dutch government thought otherwise, and used the power to pardon as a bargaining chip in getting Japan to pay reparations. See, very critical, Van Poelgeest, *Nederland en het Tribunaal*, especially at 143.

[49] See *ibid*., at 131, citing a letter from Röling to the Dutch Ministry for Foreign Affairs dated July 1955.

Röling's dissent was not limited to the concept of crimes against peace: on two other issues he made his mark, both related to individual responsibility. On both topics, his humaneness shone through: his remarks on command responsibility and on the defense of superior orders both demonstrate an empathy with the position of the individual whom circumstances force to make a decision in difficult circumstances that is often absent from international criminal law writings. In quasi-Aristotelian terms, his dissent displayed considerable empathy or compassion for the plight of individuals in a difficult situation, and appreciated that such individuals need to possess the virtue of practical wisdom (*phronesis*) in considerable measure.[50]

It is not unlikely that Röling's thinking on command responsibility was coloured by the then recent example of the *Yamashita* case – indeed, Röling discussed it at some length.[51] As is well-known, Japanese General Yamashita was found guilty by an American military tribunal after World War II of war crimes, due to the simple fact that armed forces under his command engaged in such crimes. The fact that he was cut off from his troops and had no chance of influencing them on the spot was all but ignored, both by the military tribunal and, later, the US Supreme Court (which affirmed the ruling of the military tribunal). While Yamashita had nominally been in charge, he was practically speaking not in a position to do anything of relevance or even to be made aware , and this must have touched a nerve with Röling – even though his description of the US Supreme Court decision is remarkably arid.[52]

When discussing the command responsibility of Japanese suspects in Tokyo, Röling underlined that command responsibility rested on three pillars: knowledge, power, and duty. An individual in a position of authority can only meaningfully be held to account if he or she has knowledge of what goes on, has the power (and is in a position) to intervene, and has an obligation to do so. Still,

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[50] Aristotle, in his *Ethics*, never referred to empathy as a virtue, and it seems that both the word and the concept are of relatively recent origin. That said, it appears to be a great virtue for a judge (or a court) to possess: see Jan Klabbers, 'Doing Justice? Bureaucracy, the Rule of Law and Virtue Ethics' (2017) 6 *Rivisto de Filosofia del Diritto*, 27-50. For Aristotle, I have used the 1976 Penguin edition, translated by Thomson.

[51] See *Röling dissent*, at 1063.

[52] He later explained that Yamashita 'could not have known what happened.' See Röling and Cassese, *The Tokyo Trial*, at 71.

the separation between the pillars need not be taken too far: '…the duty may imply the duty to know'.[53] And while Röling acknowledged that the scope of command responsibility may be extensive, he felt one could not simply assume the responsibility of every government member for any atrocity committed in the field or against prisoners of war or civilians.[54] Cabinet liability, as Cryer has called it, would be too broad a concept for Röling.[55]

Röling devoted a section of his dissent specifically to command responsibility. By contrast, his treatment of superior orders was less systematic and overt: it mostly came out when he discussed the punishments he thought appropriate to various accused.[56] Thus, when discussing the fate of defendant Hata, whom he characterized as a 'professional soldier', he approvingly noted that the prosecution seemed well aware of military manners and the need for loyalty and obedience. 'Soldiers nor sailors, generals nor admirals should be charged with the crime of initiating or waging an aggressive war, in case they merely performed their military duty of fighting in a war waged by their government.'[57] Ironically perhaps, in light of Röling's sensitivity to non-Western cultures, behind this sentiment lay a rather traditional and possibly quite Western idea on the respective roles of government and military. The dominant Western tradition, after all, separates the military and political spheres, and places civilian authority firmly in charge - a model that may not command universal support.[58] The military, so Röling stated over and over again, was merely supposed to be a tool of the government; it should not interfere in politics, and should possibly even be protected against having to 'meddle in politics'.[59] On the other hand, in wartime

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[53] See *Röling dissent*, at 1063.
[54] See *Röling dissent*, at 1064.
[55] See Cryer, *Röling in Tokyo*, at 1120.
[56] Röling's thoughts on this point are admirably systematized by Van der Wilt, *The Legacy*.
[57] See *Röling dissent*, at 1117. Strikingly, he almost repeats himself a few pages later: 'Soldiers and sailors should never be considered to wage an aggressive war in the sense of the Charter, even if they be Generals or Admirals, as long as they do not, in that capacity, decide government policy.' *Ibid*., at 1120.
[58] Chayes suggests that the model no longer accurately describes reality – if it ever did. See Antonia Chayes, *Borderless Wars: Civil Military Disorder and Legal Uncertainty* (Cambridge University Press, 2015).
[59] Röling himself places the term in inverted commas, and under reference to the Nuremberg judgment refers to the army as 'the honorable profession of arms'. See *Röling dissent*, at 1117-1118.

Japan, it would seem the military occupied an independent position; so much so that it could often ignore commands from the civilian authorities.[60]

If Röling's treatment of command responsibility is largely compelling, therefore, his 'superior order' treatment is more problematic. Partly, this is because he sometimes conflated the defense of the superior order with command responsibility. Partly it is because he limited the discussion of superior orders mostly to relations between the government and the military and in the context of crimes against peace – he said little of note about superior orders instructing soldiers to commit war crimes.

VI An Ethical Dilemma

It seems that Röling, initially not hindered by too much knowledge of international law and justice, upon his appointment slowly started to realize that he had become embroiled in an undertaking of questionable moral status. As time progressed, he increasingly realized that the Tokyo Tribunal was largely about victor's justice and was, in fact, less about doing justice than it was about punishing Japan. It took him a while to get there.[61] For all his misgivings, he felt quite strongly, early on, that the Court's decision should be unanimous – in fact, it was he who had enthusiastically drafted an early memo of the Tribunal on precisely this point.

He would, however, slowly come to change his mind. While it remains speculative at best to indicate why he did so, several factors are likely to have influenced his thought. First, he proved to be a hard-working student, and it is by no means eccentric to suppose that if on arrival he did not quite know what he was doing in international law, after a while he started to understand the system better; and the better he got to know it, the more outrageous must have seemed

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[60] See e.g. his discussion of the limited role played by Foreign Minister Hirota: Röling, dissent, at 1126.

[61] But once he arrived at his conclusion, he stayed faithful to it. if anything, the passage of time made him more critical still of the Tokyo Trial: see B.V.A. Röling, 'The Nuremberg and Tokyo Trials in Retrospect', in Cheriff Bassiouni and Ved P. Nanda (eds.), *A Treatise on International Criminal Law. Volume I: Crimes and Punishment* (Springfield Ill: Charles C. Thomas publisher, 1973), 590-619.

the attempt to create a new regime on crimes against peace and apply it retro-actively – at least to the trained criminal lawyer.

Second, it also seems plausible that the arrival of the Indian judge, Judge Pal, exercised some influence. Pal made it clear, right from the start, that he was going to write a dissent – therewith breaking through the unanimity of the tribunal. Since Pal would go it alone, Röling might have felt more comfortable in also going it alone and, as a result, may have felt more comfortable in further developing his own thoughts and positions. In a sense, Pal took the chestnuts out of the fire, allowing Röling to follow in his slipstream.

And maybe, just maybe, there was a third factor at play. Röling was having difficult relations with pretty much everyone involved. He did not get along with the Dutch prosecutor. After it became clear that he might be interested in writing a dissent, most of his fellow-judges by and large excommunicated him, forcing him to dine alone or with Pal. His opposition to the crimes against peace concept meant that he had a difficult relationship with the Dutch ambassador and the government at large. He even managed to distance himself from his nominal colleagues of the international law establishment in the Netherlands. And in the meantime, the trial went on and on, lasting far longer than originally scheduled which, in turn, also meant that he was separated from wife and family for much longer than initially anticipated. He did, to be sure, find ways to entertain himself, engaging in sports and music (he was an enthusiastic violinist) and, rumour has it, fraternizing with a Japanese woman.[62] Be that as it may, Röling could easily have gotten away with throwing in the towel and resigning – as he was close to doing once or twice. The big question then is why he did not resign but, instead, kept going in the face of so much opposition.

The most plausible answer, it seems, is that he relished the opposition. He was an iconoclast by vocation, who thrived on ambivalences and going against the grain. He had done so before Tokyo, as a student in Nijmegen and as a young judge under the German occupation of the Netherlands. He would do so several times in his professional life after Tokyo as well. On one occasion in the late

[62] The rumour is fairly strong, and seems to have been acknowledged even by his son. See H. Röling, *De rechter*. Note also that novelist Van Beijnum has his life in Tokyo revolve around an extra-marital affair, and that a second novelist (who actually knew him) pictured him as something of a ladies' man: see W.F. Hermans, *Onder Professoren* (Amsterdam: Bezige Bij, 1975).

1950s, he published a pamphlet endorsing the independence of New Guinea, the last remaining part of Indonesia under Dutch control. This earned him the anger of then Foreign Minister Joseph Luns, and may have cost him the prestigious chair at Leiden.[63]

There are, of course, (at least) two ways to interpret such behavior. On one interpretation, it simply suggests he was a man of principle, who would not compromise on his strongly felt beliefs and would do whatever the situation demanded of him morally, while disregarding the consequences. This however, while not untrue, would be a bit too glib. Röling had quite a few narrow escapes, where his principled stand ultimately did not cost him much. He turned away from Catholicism, but could nonetheless graduate in Nijmegen and move to Utrecht with his mentor Pompe. As a young judge in occupied Holland he annoyed the Germans, but could sit out the war in relative peace and quiet in Zeeland while continuing to work. His stance on New Guinea may have upset the foreign policy establishment a little, but his chair in Groningen was never under threat, and he was free to develop his plea for recognition of the plight of the Global South in all quietude.

Much the same applies to his affection for *polemology*: it is not immediately obvious that close to the government, in Leiden, he would have been able to do what he achieved in far-away Groningen – and he was smart enough to have made that calculation.[64] And while he did not make many friends in Tokyo, it turns out his dissent has survived the passage of time far better than the majority opinion. It does not seem all that far-fetched that with all these episodes, he was quite aware of what he could and could not afford to do. Hence, a portrayal of Röling as a proto-Kantian *Prinzipienreiter* does not seem very accurate – it does not seem to do him a great deal of justice.

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[63] Apparently, the Law Faculty at Leiden had expressed a strong preference that Röling be appointed; hence, Röling himself was convinced that not being appointed in Leiden had been due to political opposition, and was reportedly very angry when news reached him that he would not be appointed in Leiden. See H. Röling, *De rechter*, at 362. One commentator expresses some doubts, however, but without further explanation. See Roelofsen, *Röling*.

[64] Reportedly, when the Polemological Institute was set up in 1962 on Röling's initiative, the leadership of the University of Groningen felt the need to ask him, in confidence, whether he was a communist. As reported in *ibid*.

Perhaps then a second interpretation might be more accurate. It is not so much that principles played no role for him (they did), but that instead of applying them and seeing them through to the end, he rather enjoyed playing the martyr or at least having a certain nuisance value. Many of his main professional episodes suggest that he took some comfort from seeing how far the envelope could be pushed, whether the pushing was against the Catholicism of the university, the German occupier, the Dutch government's colonial policies and the Dutch international law establishment or, indeed, the majority at the Tokyo Tribunal. In all cases, he pushed from a rather secure position, and in all cases, he made sure never to go too far. He upset the Germans, but did not get arrested (or worse); he may have upset the university patrons, but never quite got expelled; he upset the Dutch government, but was never stripped of his chair; and he upset his brethren at the Tribunal, but all it cost him was social ostracism.

If the above sounds perhaps a little negative, it is not meant to be. There is much to be said for what might be called a principled pragmatism in politics, and against supporting principles with great absolutism.[65] Principles will need to be applied in constantly differing contexts and situations, and principles never apply themselves. In other words, it takes practical wisdom to assess when the situation calls for the application of a particular principle. In addition, decision-makers rarely (if ever) have the luxury of being able deeply to contemplate the proper solution: they typically work under great time pressure, and with incomplete information. Hence, to merely insist on rigid application of principles usually misses the mark – even the clearest principle needs to be accompanied by a sense of practical wisdom.[66]

Some ethical dilemmas merely lead to tragic choices: Röling could have quit the Tribunal, but that would perhaps (most likely, even) merely have resulted in the appointment of a less conscientious individual, and would have meant that he had to remain silent. In such circumstances, it may be better to bite the bullet and write a powerful dissent than to give up altogether. The problem though is

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[65] And note that he was ready to put his money where his mouth was: having sentenced individuals to death, he asked to be present at the execution because he thought that was the proper thing to do. The request was denied. See Röling and Cassese, *The Tokyo Trial*, at 65.

[66] See generally Friedrich V. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014).

that this usually only becomes clear with hindsight: the *problematique* of the 'burgomaster in wartime' (to stay on under foreign occupation in order to prevent worse things from happening) can appear opportunist as well as idealist.[67]

Be that as it may, it seems clear that Röling's own dilemma made him sensitive and receptive to the dilemmas some of those accused in Tokyo may have faced.[68] Struggling with his own conscience on how to participate in what was – at least to some extent – a show trial, he may have been more open to the plight of those who joined the Japanese government during the war in an attempt to prevent it from further aggression and atrocities. In other words, building on his own experience he may have come to appreciate the experiences of others. Even if the situations were not identical (joining an aggressive government is, after all, different from joining an international tribunal), nonetheless they were comparable enough, creative of dilemmas of similar structure. And in being open and receptive to the plight of some of the suspects on trial, Röling demonstrated to have internalized Aristotle's ethical lessons. Ethics, so Aristotle teaches us, is a matter of character, and reflective individuals continuously aim to improve and become more virtuous. Ethics is not a matter of finding a rule and sticking to it, no matter the consequences; nor is ethics a matter of calculating what the best thing to do is given the circumstances. Instead, ethics is first and foremost a matter of the character of the individual facing a dilemma, with the individual concerned having to draw on character traits such as courage, honesty, magnanimity, temperance and, perhaps most of all, practical wisdom and his or her sense of justice..[69]

VII Röling's Charisma

It seems undeniable that Röling had considerable charisma. He managed, for instance, to make a huge impression on Antonio Cassese, who not only dedicated

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[67] For a fine treatment, see Avishai Margalit, *On Compromise and Rotten Compromise* (Princeton NJ: Princeton University Press, 2010).

[68] His son Hugo suggests that there may have been something of a Japanese conspiracy going on to 'soften Röling up' by inviting him into society, by seeking contact through music and even by introducing him to pretty women. See H. Röling, *De rechter*, at 84-86.

[69] See Aristotle, *Ethics*. The list is not exhaustive.

a book to Röling[70] and interviewed him a length for another book[71], but also never tired of introducing Röling to others.[72] Röling must also be one of the very, very few law professors who end up being immortalized in novels.[73] If in W.F. Hermans' classic 1975 *Onder Professoren* he merely occupies a cameo, and the portrait of him there is mostly caricature, he is the central character in a more recent novel, Kees van Beijnum's *De Offers* as well as a recently released film.[74] Novelist Hermans was working as a lecturer at Groningen University, felt under-appreciated and wrote a vengeful portrait of vanity, self-indulgence and arrogance at a provincial university. Röling is by no means central to the story, but is cast as a seriously obese professor with two passions: the pursuit of female students, and his newly invented science of war studies under the heading 'polemology'. Like most caricatures, there is some basis in reality for this casting: Röling may not have been a serial womanizer but is generally reported to have had an eye for female beauty, and had by then turned polemology into the center of his academic work.

What attracts novelists to Röling is, one may presume, the complexity of his character, riddled as it is with seeming contradictions. People are generally expected to behave with some consistency, and outcries emerge when people are seen to be acting 'out of character' – a recent example is that of the world famous moral philosopher who has made a career out of speaking out against extreme poverty, but allegedly engaged in exploitative sexual relationships with female students from the Global South. Part of the outcry relates – and rightly so - to him exercising power in improper manner; but part of it also has to do with consistency or coherence in human action: someone who stands up for certain values should not be seen to transgress those values himself.

In a more subtle and interesting manner, something similar may apply to Röling, constantly struggling with his conscience and constantly engaged in an inner struggle to guarantee the unity of his virtues. The man held opinions that seem

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[70] See Antonio Cassese, *International Law in a Divided World* (Oxford University Press, 1986).
[71] See Röling and Cassese, *The Tokyo Trial*.
[72] See Antonio Cassese, *Five Masters of International Law* (Oxford: Hart, 2011).
[73] The only other candidate who immediately comes to mind is F.F. Martens, immortalized in Jaan Kross, *Professor Martens' Departure* (New York: New Press, 1995, Hollo trans.).
[74] The film *Tokyo Trial*, directed by Pieter Verhoeff and Rob King, opened worldwide on 25 September 2017.

difficult to reconcile with one another: in favour of peace, but also for nuclear deterrence; empathic with the suspects in the docket in Tokyo and insisting on a fair trial, but by no means shying away from imposing the death penalty. This extended to his private life: with wife and children far away in Holland, he was attracted to Japanese women, and his son surmises there may have been several lovers during the Tokyo years, but insists on denying that any of them may have been prostitutes: 'My father was not monogamous, but he was never a john, even though this is unprovable.'[75]

It is this complexity that Van Beijnum captures in his excellent novel *De Offers*, in which the Dutch judge at the Tokyo Tribunal (Judge Brink, in the novel) ends up cheating on his wife back home in the Netherlands, deserting his Japanese lover and their baby and leaving her war-invalid brother in the dark, while simultaneously aiming to do justice to the defendants before the Tribunal and, arguably, being much more successful in doing justice professionally than privately. If there is a doctrine of the unity of the virtues, as Aristotle posited, then judge Brink has a hard time keeping this unity together – and perhaps the same applied to Judge Röling.[76]

VIII Röling's Legacy

If it is fair to say that Röling's place in the pantheon of international criminal law rests on several ironies, it is nonetheless also true that a compelling case can be made that he ought to be included in the pantheon precisely because of these ironies or ambivalences. Put differently, it is precisely his focus on the surroundings of international criminal law (as opposed to international criminal

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[75] 'Mijn vader was niet monogaam, een hoerenloper was hij niet, al kun je dat nooit bewijzen.' Words attributed to Hugo Röling in Tom Vennink, 'Roman versus biografie', at www.nrcreader.nl/artikel/6964/roman-versus-biografie, visited 7 January 2015. Incidentally, the paper publishing it is generally considered the most serious Dutch quality newspaper. Elsewhere, Hugo Röling acknowledged that his father was not monogamous, but would never get carried away and was never really chasing skirts. See H. Röling, *De rechter*, at 176.

[76] Many hold the doctrine of the unity to be unworkable, if only because we can rarely see what goes on in someone's private life. See, e.g., C.A.J. Coady, *Messy Morality: The Challenge of Politics* (Oxford: Clarendon Press, 2008).

law *simpliciter*) that earns him his rightful place as one of the founding fathers. His legacy, it would seem, can be seen in threefold manner.

First, there is the overarching disciplinary level. Röling's early interest was not just in Dutch criminal law, but also in criminology – witness the topic of his doctoral thesis, witness also his involvement with his mentor Pompe and the criminological work of the Pompe Institute. One of the things coming out strongly in his 'regular' criminal law work is a belief in the idea that many criminals can better their lives, and that punishment should remain humane and proportional. Moreover, for some, psychiatric treatment might be more appropriate than a prison sentence, and law should not lose track of such circumstances. Likewise, he was keen on eradicating root causes of economic injustice, rather than incarcerating economic criminals for long periods of time.[77] His Tokyo dissent clearly oozes much the same spirit: a desire to understand the human impulses and recognition of the old biblical maxim about 'throwing the first stone'. It cannot be a coincidence that his later interest in international law came to be accompanied by an interest in polemology. Polemology, for Röling, is to international law what criminology is to criminal law: the social science indispensable for the proper understanding of the law. Polemology helps to explain the contents of international law; it helps to explain why states and people act the way they act.[78]

What remains obscure is why he felt that precisely the science of war and peace might help to understand international law – others might have opted for a different social science perspective, perhaps thinking that international law could better be explained by means of an intellectual alliance with, say, international political economy or, as is not uncommon, with the academic discipline of international relations. But perhaps this was a generational matter: many who lived through the war must have felt that peace was an essential condition for other aspects of life, whereas economic structuralism of any kind

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[77] For a brief overview in English of Röling's thoughts on criminal law generally, see Kelk, *Criminal Law Scholar*.

[78] Röling's Institute brought together scholars from fields as different as sociology and physics, or economics and biology, who would all shine their light on the different causes and consequences of aggression. See, e.g., B.V.A. Röling (ed.), *De oorlog in het licht der wetenschappen* (Assen: Van Gorcum, 1963). If the term *polemology* is not commonly used, similar ideas inform 'peace studies' or 'conflict studies'.

would have carried Marxist overtones that, for this generation and in the midst of the Cold War, may have been difficult to embrace. Moreover, the emphasis on power employed by many of his contemporaries active in the discipline of international relations failed to capture some of the salient aspects of international law in general, and international criminal law in particular. Intriguingly though, and in marked contrast to many of today's international criminal lawyers, for Röling the 'peace versus justice' question generally had to be answered by emphasizing peace. His international criminal law was never about fighting 'the culture of impunity'; his approach to the *ius in bello* was, and remained, about securing or restoring the peace.[79] Indeed, he recognized that sometimes attempts to legislate justice might end up disturbing peace; the bloodshed often associated with claims for self-determination may be considered illustrative.[80]

The second part of his legacy can be found on the level of the detailed application of international criminal law. For him, it was clear that if trials were to take place, then those accused of even the gravest violations nonetheless merited a fair trial, and while representing the Netherlands in various United Nations organs during the 1950s he proved to be a fierce (but thoughtful) proponent of the creation of a permanent international criminal court.[81] He was not against harsh sentencing, including the death penalty, but he would not dream of throwing out the rule-book in order to secure a conviction, and would have applauded, for example, recent decisions by the ICC to stop prosecutions in cases of weak evidence.[82] The law, to him, was not merely a pragmatic instrument, although he recognized that it could be this for others. But for Röling, the law had a moral quality of its own.[83] Notwithstanding his interest in the social sciences,

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[79] Verwey makes a similar observation, and drily notes that in doing so, Röling approached the *ius in bello* '(r)ather unconventionally'. See Verwey, *Bert V.A. Röling*, at 42.

[80] See further Jan Klabbers, 'The Right to be Taken Seriously: Self-determination in International Law' (2006) 28 *Human Rights Quarterly*, 186-206.

[81] For very useful discussion, see Lisette Schouten, 'From Tokyo to the United Nations: B.V.A. Röling, International Criminal Jurisdiction and the Debate on Establishing an International Criminal Court, 1949-1957', in Bergsmo et al. (eds.), *Historical Origins*, 177-212.

[82] See ICC-01/09-01/11, *Prosecutor* v *William Samoei Ruto and Joshua Arap Sang*, decision of 5 April 2016.

[83] Röling noted in his diary, with some disdain, that others treated the law as purely instrumental. This now was a sentiment he could not share, and his son imagines that his father would have deemed the instrumentalist view to constitute 'jesuit trickery' ('paaps gesjoemel'). See H. Röling, *De rechter*, at 226.

whether criminology or polemology, he remained lawyer enough to appreciate the virtues of a proper prosecution and defense, presided over by properly trained judges applying the law in an open and honest manner.[84]

The third part of his legacy is less clear-cut and less obvious, but can nonetheless be discerned. Already throughout his dissent, he displayed a remarkable willingness to take different, non-western cultures seriously, and his lengthy stay in Japan opened up a new culture to which he was quite receptive. While admittedly his remarks on superior orders may have owed much to a western distinction concerning the proper roles of government and the military, nonetheless his dissent is sensitive to different cultural notions and perspectives – without bowing to them. His stay in Japan planted the seeds for his growing conviction that international law ought not to be complicit in the suppression and exploitation of non-Western peoples and their cultures, but should rather involve the 'annulment of the former law of domination', be of general application rather than based on a distinction between civilized nations and others, and should expand so as to come to include a social justice component.[85]

IX To Conclude

Röling stands as one of the intellectual forefathers of international criminal law, and while his place there is somewhat ironic, it is nonetheless well-deserved. Perhaps less obviously though, he should be remembered for his ethical stance. The principled pragmatist that Röling was clearly struggled with a large ethical dilemma (whether to participate in what was to a considerable extent a show trial) and a few smaller ones as well, relating to command responsibility and the superior order defense. In all of these, he eventually let himself be guided by a sense of empathy or compassion with the accused, trying to look at the world through their eyes, and from the vantage point of their cultural traditions.

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[84] He also advocated shooting those who received the death penalty, rather than hanging them, unless they had been exceptionally cruel themselves. See *ibid*., at 163.

[85] See Röling, *Expanded World*, at 121.

In doing so, he provides a nice exemplar of the virtuous judge[86], the sort of judge who realizes that law is never a matter of algorithms and dictionary definitions, but also involves courage, carefulness, temperance and perhaps most of all the practical wisdom – Aristotle spoke of *phronesis* - to apply one's technical skills properly.[87] Röling is by no means the only judge in recorded history to display this set of judicial virtues[88], but the example he offered in Tokyo still shines.

[86] For philosophical underpinnings, see Amalia Amaya, 'Exemplarism and Judicial Virtue' (2013) 25 *Law & Literature*, 428-445.
[87] See e.g. Colin Farrelly and Lawrence B. Solum (eds.), *Virtue Jurisprudence* (New York: Palgrave MacMillan, 2008); Amalia Amaya and Ho Hock Lai (eds.), *Law, Virtue and Justice* (Oxford: Hart, 2013), and Iris van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (2015) 44 *Netherlands Journal of Legal Philosophy*, 24-46.
[88] Without using the vocabulary of Aristotelian ethics, the examples offered by Hutchinson are instructive. See Allen Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge University Press, 2012).